Supreme Court, U.S.
FILED
AUG 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 86-73

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

BEULAH W. BOOKER,
Petitioner

vs.

EVELYN MOBLEY, M.D.,
Respondent

On Writ Of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Attorneys for Respondent
Evelyn Mobley, M.D.

QUESTIONS PRESENTED FOR REVIEW

Whether or not an employee claiming that her employer's plant medical director negligently caused her to sustain severe injuries may maintain an action in federal court against said plant medical director because the state court in which she initiated the action considered her claim to be a medical malpractice action which was barred by the state statute of limitations.

PARTIES TO THE PROCEEDINGS
IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Beulah W. Booker
Plaintiff-Appellant

— and —

Evelyn Mobley, M.D.
Defendant-Appellee

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STATEMENT OF THE CASE

Plaintiff-Appellant Beulah W. Booker (Petitioner) filed a Complaint in Montgomery County Ohio Common Pleas Court on August 17, 1983, claiming that Evelyn Mobley, M.D., Plant Medical Director for Delco Moraine Division, General Motors Corporation (Respondent) had refused to honor Petitioner's medical restrictions and had ordered her to do jobs that were making her hands hurt; that as a result of Respondent's negligence, Petitioner sustained severe injuries.

The trial court, sua sponte, determined the case to be a medical malpractice claim as defined under Ohio law and referred the case to arbitration pursuant to the mandatory provisions of the Ohio law which requires medical malpractice claims to be submitted to an arbitration board. Respondent filed a Motion for Summary Judgment on the basis that the one-year statute of limitations for medical malpractice claims barred Petitioner's claim because Petitioner knew or should have known of her condition when she went on sick leave on June 16, 1982, more than one year prior to the filing of her Complaint. The trial court sustained Respondent's Motion for Summary Judgment and Petitioner appealed to the Court of Appeals for Montgomery County, Ohio. On April 3, 1985, the Court of Appeals rendered its decision affirming the trial court. Respondent filed a Motion for Reconsideration which was denied by the Court of Appeals on May 15, 1985.

On May 31, 1985, Respondent filed her Complaint in the United States District Court for the Southern District of Ohio, Western Division, at Dayton, Ohio. The factual allegations were similar to the allegations in the Complaint filed in state court. In addition, Respondent asserted that the state trial court had referred the case to arbitration as a medical malpractice action without her consent which was in violation of her rights under the 14th Amendment and the Civil Rights Act of 1866.

By Order of June 28, 1985, the United States District Court for the Southern District of Ohio dismissed Petitioner's

Compliant, sua sponte, for want of subject matter jurisdiction. Petitioner appealed this decision to the United States Court of Appeals for the Sixth Circuit which affirmed the decision of the trial court on January 15, 1986.

ARGUMENT

I. THERE ARE NO SPECIAL OR IMPORTANT REASONS WHY THE COURT SHOULD EXERCISE ITS DISCRETION AND GRANT CERTIORARI.

Petitioner claims her hands and wrists were injured when her employer's plant medical director ignored her medical restrictions and ordered her to perform work she could not do without injury. Petitioner filed suit in state court. The trial court considered Petitioner's claim to be one of medical malpractice and dismissed her suit because it was barred by the Ohio statute of limitations. Petitioner appealed to the Montgomery County Court of Appeals in the State of Ohio which affirmed the trial court and denied Petitioner's application for reconsideration. Two weeks later, Petitioner filed suit in the United States District Court for the Southern District of Ohio, Western Division, at Dayton, Ohio.

None of the considerations governing review on certiorari enunciated in Supreme Court Rule 17 are present in this case. There is no conflict in the decisions of the United States Circuit Courts; no conflict with the decision of a state court; and no important question of federal law which should be settled by this Court.

II. THE DISTRICT COURT WAS CORRECT IN FINDING IT LACKED SUBJECT MATTER JURISDICTION.

The District Court found as follows:

> *" When Plaintiff becomes dissatisfied with the rulings made in the state court proceedings, she initiates an action in this Court. The fatal flaw in Plaintiff's method of proceeding is that this Court is totally devoid of subject matter jurisdiction."*
>
> *(Appendix B-2 Petition for Certiorari)*

The District Court concluded that the basis of jurisdiction must be diversity of citizenship, removal or a federal question. Since both Petitioner and Respondent were

both residents of Ohio, diversity did not exist between them and cannot serve as a basis for jurisdiction under 28 U.S.C. § 1332. 28 U.S.C. § 1443 authorizes a defendant to remove an action from state court to federal court and since Petitioner was the plaintiff in the state court proceedings, she cannot avail herself of the removal sections as a basis for federal court jurisdiction Hull v. Jackson County Circuit Court 138 F. 2d 820 (6th Cir. 1943). Petitioner's reliance on Georgia v. Rachel, 384 U.S. 780, 16 Led. 2d 925 (1966), where defendants removed a criminal trespass prosecution to federal court, is misplaced.

28 U.S.C. § 1331 grants the district courts original jurisdiction in civil actions arising under the Constitution laws, or treaties of the United States. The district court found that Petitioner did not contend that Respondent personally deprived her of equal protection or any other civil right; that the only claim against Respondent arose out of the medical treatment she received from the Respondent. The District Court found, and rightly so, that the Petitioner was attempting to "appeal" certain rulings made in the state court proceedings to federal court, and the district court was without jurisdiction to review the decision of state courts under the guise of a civil rights action. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). Accordingly, there was no basis for the District Court to assume subject matter jurisdiction in this action.

III. PETITIONER HAS NOT BEEN DEPRIVED OF A CONSTITUTIONAL RIGHT.

Petitioner asserts that the First, Seventh, Thirteenth and Fourteenth Amendments are the Constitutional provisions involved in this case. However, the allegations contained in Petitioner's Statement of the Case and Reasons Why The Writ Should Be Granted in her Petition for Certiorari fail to demonstrate any violation of a constitutional right, with one possible exception. Peti-

tioner claims that her action against Respondent was a negligence action with a two year statute of limitation and the state court erred in considering the action to be one for malpractice and applying the one-year statute of limitations. Furthermore, Petitioner argues that even if the one year statute of limitations applied, her Complaint in state court was timely filed because she filed her complaint within one year after she discovered her injuries. All of these issues were resolved by the state court adversely to Petitioner. None of these issues had anything to do with the deprivation of a constitutional right; the state court simply did not agree with Petitioner's version of the facts or her contentions of the applicable law.

Petitioner asserts that on December 9, 1983, a second pre-trial conference was held without notifying Petitioner (Page 7, Petition for Certiorari). Presumably this alleged failure to notify Petitioner of a pre-trial conference violated her constitutional right of due process of law. There is nothing in the order of the Montgomery County Common Pleas Court (Appendix D, Petition for Certiorari) or the decision of the Court of Appeals of Montgomery County (Appendix C, Petition for Certiorari) to support this bare allegation. Furthermore, there is nothing to suggest that the alleged second pre-trial conference adversely affected Plaintiff's prosecution of her claim. The critical motion to which Petitioner was entitled to notice and an opportunity to respond was Respondent's Motion for Summary Judgment that was filed August 31, 1984. By order dated September 12, 1984, the trial court notified Petitioner and Respondent that the motion for summary judgment would be heard September 28, 1984, (Appendix 3). Petitioner does not contend she never received the notice of hearing. On September 24, 1984, Petitioner filed a motion to postpone the hearing scheduled for September 28, 1984, and on September 26, 1984, filed a written response to Respondent's Motion for Summary Judgment. The trial court proceeded to

consider Respondent's Motion for Summary Judgment and Petitioner's written response, refused to postpone the hearing and entered judgment for Respondent. Clearly, Petitioner was given the opportunity to be heard and there was no violation of due process of law.

CONCLUSION

Petitioner is a *pro-se* litigant. She claims that Respondent was responsible for her injuries at work.. When the state courts refused to grant her relief, she turned to the federal judiciary claiming violation of various constitutional provision. The record in this case affords no basis for concluding that Respondent violated any of Petitioner's constitutional rights. Petitioner has had ample opportunity to be heard and her petition for certiorari should be denied.

Respectfully submitted,

Robert B. Crew
Cowden, Pfarrer, Crew & Becker
2580 Kettering Tower
Dayton, Ohio 45423
(513) 223-6211
Attorney for Respondent
Evelyn Mobley, M.D.

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of August, 1986, three copies of the foregoing document were deposited in a United States mailbox, with first class postage pre-paid and served upon Beulah W. Booker, 643 Miami Chapel Road, Dayton, Ohio 45408, Petitioner pro se.

Robert B. Crew

APPENDIX I

No. 85-3568

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BEULAH W. BOOKER, :
Plaintiff-Appellant :

vs. :

DR. EVELYN MOBLEY, M.D., :
Defendant-Appellee :

BEFORE: JONES and NELSON, Circuit Judges; and
PECK, Senior Circuit Judge

Plaintiff is appealing from a judgment dismissing her civil action for lack of subject matter jurisdiction. The appeal has been referred to a panel of the Court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon consideration of the record and briefs, this panel agrees unanimously that oral argument is not needed. Rule 34(a), Federal Rules of Appellate Procedure.

The record shows that plaintiff is an employee of Delco-Moraine Division, General Motors Corporation, at its plant located in Dayton, Ohio. Defendant is a physician and the plant medical director for said employer. The complaint alleges that plaintiff received injuries to her wrists and forearms as a result of her work and that defendant was negligent in treating her injuries. Plaintiff also claims that in a prior state action, the court dismissed her suit because she was black, thereby violating the Equal Protection Clause. The district court dismissed plaintiff's case sua sponte.

Upon consideration, we agree with the district court's conclusion that it lacked jurisdication to consider plaintiff's claims.

Therefore, it is ORDERED that the judgment below be affirmed for the reasons stated by the district court in its memorandum opinion of June 28, 1985. Rule 9(d)(2), Rules of the Sixth Circuit. Entered by order of the Court:

John P. Hehman, Clerk

January 15, 1986

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BEULAH BOOKER, Plaintiff		
vs.	June 28, 1985	Case No. C-3-85-454
EVELYN MOBLEY, M.D., Defendant		

ENTRY DISMISSING PLAINTIFF'S COMPLAINT, *SUA SPONTE*, FOR WANT OF SUBJECT MATTER JURISDICTION: TERMINATION ENTRY

The filing of this case represents the second time that Plaintiff, Beulah Booker, has initiated an action in this Court seeking damages from Defendant Evelyn Mobley, M.D., for the latter's alleged medical malpractice. See Booker v. Mobley, Case No. C-3-83-1299 (S.D. Ohio). As with the earlier lawsuit, this Court sua sponte dismiss Plaintiff's complaint without prejudice for want of subject matter jurisdiction.

Plaintiff's actions in this Court have shadowed a medical malpractice action which Plaintiff has pursued against Defendant in state court ("state court proceedings"). See Booker v. Mobley, Case No. 83-2237 (Mont. Cty.). When Plaintiff becomes dissatisfied with the rulings made in the state court proceedings, she initiates an action in this Court. The fatal flaw in Plaintiff's method of proceeding is that this Court is totally devoid of subject matter jurisdiction. Diversity does not exist between Plaintiff and Defendant; therefore, diversity cannot serve as a basis for jurisdiction. See 28 U.S.C. § 1332. Also, for reasons that follow, the Court concludes that it has neither "federal question" nor removal jurisdiction over this case. See 28 U.S.C. §§1331, 1441, 1443.

Although Plaintiff has checked "Federal Question" as the basis of jurisdiction on her civil cover sheet, her complaint does not specifically state what federal question it raises.

In other words, Plaintiff does not specifically state what federal law or constitutional provision her claim arises under. However, the Court concludes, from the reading of the complaint, that the Plaintiff is asserting deprivations of her constitutional rights, namely equal protection of the laws, and the right to jury trial in civil cases guaranteed by the Seventh Amendment. This Court is firmly convinced that Plaintiff does not, nor could she, state a civil rights claim over which this Court has jurisdiction. It is apparent that the Plaintiff does not contend that the Defendant personally deprived her of equal protection or of any other civil right. The only claims that Plaintiff asserts against Defendant arise out of the medical treatment she received from the defendant. On the other hand, Plaintiff's civil rights claims arise out of the conduct of the state court action. Plaintiff alleges that in the state court action she was deprived of equal protection and her Seventh Amendment right to a jury trial was violated.[1] Thus, the Plaintiff is in effect "appealing" certain rulings made in the state court proceedings to this Court. Without question, this Court is without jurisdiction to review the decisions of state courts under the guise of a civil rights action. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983). Such review may be had only in the United States Supreme Court. 28 U.S.C. §1257.

Furthermore, 28 U.S.C. §1443, which authorizes a defendant to remove an action from state court to federal court when that person "cannot enforce in [the state court] a right under any law providing for the equal civil rights of citizens of the United States," does not serve as a basis for jurisdiction over the present case because §1443 is limited by its own language to defendants. See Hull v. Jackson County Circuit

[1] Parenthetically, the Court notes that the Seventh Amendment does not apply to states. See, e.g., Letendre v. Fugate, 701 F.2d 1093 (4th Cir. 1983); Olesen v. Trust Co. of Chicago, 245 F.2d 522 (7th Cir.), cert. denied, 355 U.S. 896 (1957). Thus, even assuming arguendo that Plaintiff was denied a jury trial in state court, this denial could not have deprived Plaintiff of a right guaranteed by the Seventh Amendment.

Court, 138 F.2d 820 (6th Cir. 1943). The Plaintiff herein is the plaintiff in the state court proceedings.

Based upon the foregoing, the Court concludes that it is totally devoid of subject matter jurisdiction over the present case, whether such jurisdiction is based on diversity of citizenship, a federal question or removal. Accordingly, the Court hereby dismisses the above captioned cause, sua sponte, for want of subject matter jurisdiction.[2]

The captioned cause is hereby ordered terminated upon the docket records of the United States District Court, Southern District of Ohio, Western Division, at Dayton.

Walter H. Rice
United States District Judge

Copies mailed to:

Beulah W. Booker
643 Miami Chapel Road
Dayton, Ohio 45408
(Pro Se Plaintiff)

Joseph P. Buchanan
Attorney at Law
2580 Kettering Tower
Dayton, Ohio 45423
(Counsel for Defendant)

[2] This Court is well aware that the Sixth Circuit has recently circumscribed the authority of the district courts to enter sua sponte dismissals. See, e.g., Morrison v. Tomano, 755 F.2d 515 (6th Cir. 1985); Tingler v. Marshall, 716 F.2d 1109 (6th Cir. 1983). However, Tingler and Morrison do not purport to limit the authority of a district court to enter a sua sponte dismissal when, as here, there is a patent absence of subject matter jurisdiction.

APPENDIX 3

IN THE COMMON PLEAS COURT
OF MONTGOMERY COUNTY, OHIO

BEULAH BOOKER,	:	
Plaintiff	:	Case No. 83-2237
vs.	:	(Judge John W. Kessler)
DR. EVELYN MOBLEY, M.D.,	:	
Defendant	:	
	: : : : :	ENTRY

This matter is hereby set for hearing on the 28th day of September, 1984, at 9:30 a.m., in Courtroom No. 9, on Defendant's Motion for Summary Judgment.

APPROVED:

JOHN W. KESSLER, JUDGE

September 12, 1984

Copies of this Entry were forwarded to all parties listed below by ordinary mail this filing date.

Beulah W. Booker, Plaintiff, 643 Miami Chapel Road, Dayton, Ohio 45408

Joseph P. Buchanan, Attorney for Defendant, 2580 Kettering Tower, Dayton, Ohio 45423

Gregg Findlay, Bailiff

Filed 84, September 12 P3:23